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PUBLIC CONTRACTS

Annual Review 2022

January 24 – 27, 2022

DAY 1

12:00 p.m. Bid Protests

2:00 p.m. Investigations, Disclosures & S&D

3:00 p.m. Labor & Employment

MONDAY, JANUARY 24, 2022

12:00 PM to 5:00 PM



Alan Chvotkin
President, Pub K Group
Partner, Nichols Liu LLP

News for the Government Contracts Community

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PUBLIC CONTRACTS | LAW

Legal decisions and developments for the government contracts community

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PUBLIC CONTRACTS | CYBER

Monitoring the government response to cybersecurity threats and trends

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PUBLIC CONTRACTS | COMPLIANCE

Developments and insights in ethics, compliance, and FCA/FCPA enforcement

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CLEs

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SESSION 3

LABOR AND EMPLOYMENT

MONDAY, JANUARY 24, 2022

3:00 PM to 4:50 PM



Michael J. Schrier
Husch Blackwell LLP



Richard W. Arnholt
Bass, Berry & Sims PLC



Howard Wolf-Rodda
Abrahams Wolf-Rodda



Nichole Atallah
PilieroMazza PLLC

Minimum Wage for Government Contractors

Minimum Wage for Government Contractors

- Executive Order by President Biden (EO 14026; 29 CFR part 23)
 - Increased rate first set in Obama Executive Order (EO 13658; 29 CFR part 10)
 - Old rate: \$11.25 (\$7.90 for tipped employees)
 - New rate: \$15 (\$10.50 for tipped employees)
 - Annual Rate increases indexed to Urban wage earner CPI (tipped wages increase to 100% of overall wage rate by Jan. 1, 2024)

Minimum Wage for Government Contractors

- Applicability:
 - Individuals who work *on or in connection with* a federal government contract
 - Includes contracts and contract-like instruments for:
 - Services (SCA)
 - Construction (Davis-Bacon)
 - Concessions
 - Others

Minimum Wage for Government Contractors

- “On or in connection with:”
 - Working on contract is doing things in the scope of work
 - In connection with refers to activity that is necessary to performance of contract
 - No change from Obama E.O. except that terms are expressly defined
 - Tracking challenges – 20%; *other work*.

Minimum Wage for Government Contractors

- Roll out of clause – “new” contracts
 - New solicitations or awards
 - Exercise of options
 - Orders under BOAs or Purchase Orders are “contract-like”
 - Task orders under existing GSA schedule contracts, other multiple award contracts or ID/IQ contracts are not covered

Minimum Wage for Government Contractors

- Transition to new EO
 - Compliance not required until clauses are in contract
 - Old EO survives until replaced

Minimum Wage for Government Contractors

- Rate increase = biggest change
 - Many more workers will be affected
 - Old rate rarely exceeded prevailing wage
 - Impact of new rate will be pervasive
 - Wage compression

Minimum Wage for Government Contractors

- Compliance going forward:
 - What's my rate
 - Who's doing what
 - Recordkeeping, recordkeeping, recordkeeping
 - Price adjustments – for what and when?

Minimum Wage for Government Contractors

- Conclusion:
 - Not much is new regarding applicability and coverage
 - Rate change is significant
 - Disciplined approach to compliance more important than ever

Nondisplacement of Qualified Workers Under Service Contracts

Executive Order 14055

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Overview of Nondisplacement

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- Executive Order 14055 – November 18, 2021
- Return of Obama Era EO 13495, but with some new twists
- Successor contractors must offer a right of first refusal to all service employees working for predecessor contractor

Nondisplacement - Coverage

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- “Contract” defined as “any contract, contract-like instrument, or subcontract for services . . . That is covered by the Service Contract Act.”
- EO 13495 – only applied to “any contract or subcontract”

Nondisplacement – Exclusions From Coverage

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- Contracts under the simplified acquisition threshold
- Employees hired to work under both a federal service contract and one or more nonfederal service contracts “as part of a single job”

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Nondisplacement – “Contract Clause” (a)

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- Shall make a good faith offer of employment (right of first refusal) to all SCA covered service employees
- Cannot offer employment to anyone before complying with EO
- Must make express offer of employment and give no less than 10 business days to accept

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Nondisplacement – “Contract Clause” (b)

- Not required to offer right of first refusal to any service employees not covered by SCA
- Not required to offer to any employee “whom the contractor . . . reasonably believes, based on reliable evidence of the particular employee’s past performance, that there would be just cause to discharge the employee.”

Nondisplacement – “Contract Clause” (c)

- Predecessor shall, not less than 10 days prior to contract completion, provide CO a certified list of all prime and sub SCA service employees working during last month
- Include SCA anniversary dates
- CO shall provide list to successor contractor, and may be requested by “employees or their representatives”

Nondisplacement – “Contract Clause” (e)

- Flowdown requirement to ensure compliance with contract clauses (a), (b), and (c)
- Contractor shall take enforcement action against subcontractors, as directed by Secretary of Labor
- Contractor may request USG enter any litigation with subcontractor regarding EO enforcement

Nondisplacement – DOL Enforcement

- Sanctions and remedies – “including, but not limited to, orders requiring employment and payment of wages lost”
- Up to 3 year debarment for willful violations of EO or failure to comply with DOL orders
- No CDA rights, all disputes to be resolved per DOL regulations

Nondisplacement – Location Continuity

- Agencies “shall consider whether performance of the work in the same locality or localities in which contract is currently being performed is reasonably necessary to ensure economical and efficient provision of services.”
- If yes, then agency “shall . . . include a requirement or preference” that successor contract be performed in same locality

Nondisplacement – Agency Exceptions

- Agencies may grant exceptions from EO coverage on narrow grounds
- Agencies shall publish exceptions granted and require contractors notify, in writing, “affected workers and their collective bargaining representatives”

Nondisplacement – Regulations

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- DOL required to issue final agency regulations within 180 days of EO (NLT May 17, 2022)
- FAR Council shall amend the FAR within 60 days of DOL issuing final regulations (NLT July 15, 2022)

OFCCP Trends and New Certification Requirements

E.O. 11246

- Established requirements for non-discriminatory practices in hiring and employment on the part of U.S. government contractors

Section 503 of the Rehabilitation Act of 1973

- Requires affirmative action and prohibits employment discrimination by federal government contractors and subcontractors with contracts of more than \$10,000

Vietnam Era Veterans' Readjustment Assistance Act of 1974

- Originally enacted to protect returning veterans from the Vietnam War from discrimination, it now covers all veterans

■ Director Jenny Yang

- ▶ Formerly a plaintiff's attorney and then appointed to Chair of the Equal Employment Opportunity Commission (EEOC) before the OFCCP
- ▶ During her time at EEOC, introduced requirement to disclose pay data on EEO-1 reports
- ▶ Focus on pay equity and compensation discrimination

OFCCP Developments 2021

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■ Despite pandemic, a lot of activity and developments:

- ▷ New self-ID form for disabilities
- ▷ Implementation of Early Resolution Procedure (ERP) for conciliation agreements
- ▷ Second highest year for monetary settlements – \$35.6 million
- ▷ Focus on Section 503 Focused Reviews
- ▷ High number of nonfinancial conciliation agreements (75 total)

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Rescission of Notice of Intention Not to Request, Accept or Use Employer Information

- ▶ On September 2, 2021, OFCCP published its Rescission of Notice of Intention Not To Request, Accept or Use Employer Information Report (EEO-1) Component 2 Data, 25 November 2019. The rescinded 2019 notice indicated that OFCCP would not request, accept, or use EEO-1 Component 2 data because the agency believed the data's aggregated nature would not prove useful in its administration and enforcement of E.O. 11246
- ▶ OFCCP now plans to analyze previously collected Component 2 data, derive available insights into pay disparities across industries and occupations, and reassess the data's utility in advancing the OFCCP's goal of combating pay discrimination

President Biden's Executive Orders

- ▶ E.O. 13985 – “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government” – revokes E.O. 13950 issued by former President Trump (E.O. on Combating Race and Sex Stereotyping). According to this new E.O., advancing equity across the federal government “can create opportunities for the improvement of communities that have been historically underserved” and “each agency must assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups”

OFCCP AAP Initiative

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AAP Verification

- ▶ Directive 2018-07, Affirmative Action Program Verification Initiative, which aims at ensuring covered contractors are annually preparing and implementing written AAPs

AAP Certification

- On **Feb. 1, 2022**, contractors may begin registering for access to the portal. OFCCP will also send an e-mail to each covered federal contractor in its jurisdiction whose email information is available in its system inviting them to register.
- On **March 31, 2022**, contractors will be able to utilize the certification feature in the portal to certify their AAP compliance.
- By **June 30, 2022**, existing contractors must certify whether they have developed and maintained an affirmative action program for each establishment and/or functional unit, as applicable.

OFCCP AAP Initiative

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- Supply and service contractors who meet the thresholds for having AAPs will be required to use the portal
- At this time, construction contractors who are not also supply and service contractors are *not* required to use the portal or certify AAP compliance
- Certifying AAP compliance will not exempt contractors from OFCCP compliance evaluations

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DOL Enforcement Update

DOL Enforcement – FLSA

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- Ongoing focus on classification issues
- Independent contractors
- White collar exemptions

DOL Enforcement – Service Contract Act

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- Remote workers and wage determinations
- Classifications
- Sick leave
- Impact of minimum wage on SCA wage determination rates
- Charging employees for benefit administration
- Targeted investigations by site

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DOL Enforcement – Davis Bacon Act

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- Classifications
- Independent Contractors
- Practice in the locality

Government Contractor Vaccine Mandate

Executive Order 14402

Vaccine Mandate

- Requires covered contractor employees of covered contractors be vaccinated unless entitled to a medical or religious accommodation
- Do contractors have to comply with the contractor vaccine mandate?
- Are government contractors subject to any other vaccine mandates?
 - ▷ OSHA Emergency Temporary Standard
 - ▷ CMS Health Care Staff Vaccination Interim Final Rule
- What is the status of the OSHA ETS and the CMS Rule?

Notable Labor and Employment Cases for Federal Contractors

2021

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- *In the Matter of: Office of Federal Contract Compliance Programs, United States Department of Labor v. WMS Solutions, LLC, ARB Case No. 2020-0057 (ARB Nov.18, 2021)*
- *In the Matter of: Office of Federal Contract Compliance Programs, United States Department of Labor v. Enterprise RAC Company of Baltimore, LLC, ARB Case No. 2019-0072 (ARB Nov. 3, 2021)*

Davis Bacon Act

- *Int'l Bhd. of Elec. Workers, Loc. 113 v. T & H Servs.*, 8 F.4th 950 (10th Cir. 2021)
- *United States ex rel. Int'l Bhd. of Elec. Workers Loc. Union No. 98 v. Fairfield Co.*, 5 F.4th 315 (3d Cir. 2021)
- *United States v. Estepa*, 998 F.3d 898 (11th Cir. 2021)
- *Appeal of -- Gulf Pac. Contracting, LLC*, ASBCA No. 61434, 21-1 B.C.A. (CCH) ¶ 37928 (Sept. 16, 2021)

Davis Bacon Act

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- *In the Matter of: District Council of Iron Workers of the State of California and Vicinity v. Wage and Hour Division, United States Department of Labor, ARB Case No. 2020-0035 (ARB Sept. 27, 2021)*
- *In the Matter of: System Tech, Inc. v. United States Department of Labor, Administrator, Wage and Hour Division, ARB Case No. 2020-0029 (ARB May 25, 2021)*

Davis Bacon Act

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- *In the Matter of: The Residences at Boland Place, Richmond Heights, Missouri, with respect to Wage Rate Determination related to FHA Project No. 085-35566, ARB Case No. 2020-0031 (ARB Apr. 30, 2021)*
- *In the Matter of: Nevada Chapter of the Associated General Contractors of America, Inc.; Associated Builders and Contractors, Nevada Chapter; and Nevada Trucking Association, Inc., ARB Case No. 2020-0058 (ARB July 29, 2021)*

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Service Contract Act and Nondisplacement

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- *International Brotherhood of Electrical Workers, Local 113 v. Administrator, Wage & Hour Division, U.S. Department of Labor, ARB Case No. 2020-0039 (ARB Sept. 1, 2021)*
- *In the Matter of: Innovair LLC v. Administrator, Wage and Hour Division, ARB Case No. 2020-0070 (ARB Nov. 12, 2021)*

Service Contract Act and Nondisplacement

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- *In the Matter of: American Security Programs, Inc. v. United States Department of Labor, Administrator, Wage and Hour Division*, ARB Case No. 2019-0084 (ARB Mar. 25, 2021)
- *Matter of: Gemini Tech Services, Inc.*, B-418233.5, 2021CPD ¶ 111 (Comp. Gen. March 2, 2021)
- *Paugh v. Lockheed Martin Corporation*, EP-20-CV-154-DB, 2021 WL1841644 (W.D.Tex., 2021)

Notable Cases from 2021

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■ Questions?

THANK YOU!

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Thank you!

**See you tomorrow at 12:00 p.m. for
Day 2 of Pub K's Annual Review 2022**



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